United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1174

To be argued by
RICHARD J. HOSKINS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1174

UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES REED,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

James Reed appeals from a judgment of conviction entered on April 8, 1975 in the United States District Court for the Southern District of New York after a two-day trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury.

Indictment 74 Cr. 861, filed on September 10, 1974, charged Reed and Gerald Michael Hardy * in one count with conspiracy to violate the federal narcotics laws, in violation of Title 21, United States Code, Section 846.

Trial commenced on February 13, 1975. On February 14, the jury found Reed guilty as charged.

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* Hardy pleaded guilty on May 16, 1975 and was sentenced on June 24, 1975.

On April 8, 1975, Judge Palmieri sentenced Reed to the custody of the Attorney General for imprisonment for a period of 15 months to be followed by three years of special parole pursuant to Title 21, United States Code, Section 841. The defendant was remanded.

Statement of Facts

The Government's Case

On February 12, 1974, Special Agent William Simpson of the Drug Enforcement Administration ("DEA"), acting in an undercover capacity, arranged for a meeting with Lucien Feldon to discuss a drug transaction (Tr. 45-46).* On February 13, 1974, Simpson and another undercover agent, C. Gordon, whom Simpson introduced as his brother, met Feldon at his apartment and discussed the purchase of one-quarter kilogram of cocaine for $7,000. In connection with that purchase, Feldon made a telephone call to a "Gerry." Simpson and Gordon then left the apartment to get the $7,000 and made arrangements to contact Feldon later in the day.

At about 3:00 that afternoon, after having called Feldon, Simpson and Gordon returned to Feldon's apartment and were introduced to Gerry.** Gerry suggested that he would take the $7,000 and return with the cocaine while Simpson and Gordon waited at the apartment. When Simpson insisted on seeing the cocaine before turning over the money, Gerry said, "Let me call my man." After calling, Gerry told the agents that "I just contacted my source"

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* "Tr." refers to the transcript of the trial; "H. Tr." refers to the transcript of the *Miranda* hearing; "GX" refers to the Government's exhibits at trial; "Br." refers to appellant's brief; "App." refers to the appellant's appendix.

** Gerald Michael Hardy.

and that it would be all right for them to go along (Tr. 46-48, 66-68, 76-77).

Simpson, Gordon and Gerry then left Feldon's apartment. Gordon drove away in the undercover Government car while Simpson and Gerry travelled by taxi to 96th Street and Park Avenue in Manhattan, where Gerry introduced Simpson to the defendant Reed. Gerry and Simpson got into Reed's car where Reed agreed that he would try to get the cocaine to turn over to Simpson before Simpson gave up the money. All three men then got out of the car, Reed walked half way up the block then returned saying, "Look, I know these people are not going to do it that way . . . ." Reed suggested, however, that he might be able to get some "flake" cocaine from "a friend." After Simpson agreed that that would be fine, Reed walked across the street into a candy store and made a call from a phone booth. He returned and said that he had a friend at 133rd Street in Manhattan who would sell them a quarter kilogram for $6,500. Simpson said that that was agreeable and the three men waited for Special Agent Gordon (posing as Simpson's brother) to meet them with the money. After waiting 10 to 15 minutes, however, Reed said that he had to leave to wait for an important phone call at his apartment. It was agreed that Simpson would call him later in connection with completing the transaction (Tr. 48-51, 68, 78-79, 91-92).

A week later, on February 19, 1974, Simpson called Reed at home to set up a meeting to complete the cocaine transaction and recorded the conversation, which was played for the jury (GX 1) with transcripts provided as an aid (GX 1-A; App. A-18-21). Reed told Sompson that he had been in contact with his source for the drugs but that he still had to determine "what kind of price" the source wanted for the drugs. Simpson reminded Reed that he wanted to see what he was getting before he gave up his money, and Reed agreed that he would call his source and confirm that

the deal would take place at 2 p.m. that day. A few minutes later, Reed called Simpson back (this conversation was also recorded) and told him that he would meet Simpson at 96th Street and Park Avenue after lunch (Tr. 52-55; GX 1, 1-A).

Later in the afternoon of February 19, but before Simpson and Gordon arrived at 96th and Park, the defendant came out of a building in that area, went into a carpet store in the middle of the block between 96th and 97th Streets, came out of the carpet store and had a brief conversation with another black man, then got into his car and drove off after the other man went back into the store. A few minutes later, Simpson and Gordon arrived to meet with Reed, but were told by surveillance agents that he had already left (Tr. 69, 89, 92-93).

In November, 1974, Reed was arrested by DEA agents and brought to the United States Attorney's Office prior to arraignment. After *Miranda* warnings, Reed admitted to the Assistant United States Attorney and DEA agents that "last winter" he had negotiated with a black agent for the sale of one-quarter kilogram of cocaine.* Reed said that the sale was to take place in the vicinity of 96th Street and Park Avenue in Manhattan and that Reed was to purchase the cocaine from a black man named Red who worked in the R & O carpet store located near Park Avenue and 97th Street. However, Reed said he traveled to West Virginia shortly after the negotiations with Simpson and did not complete the deal (Tr. 80-82).

The Defense Case

Reed offered no evidence.

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* Agents Simpson and Gordon are black men (Tr. 191).

ARGUMENT

POINT I

The trial court's refusal to preclude evidence of defendant's recorded conversation with an undercover agent was not error when counsel was given a transcript of the conversation three days before trial.

During the week preceding the trial the Government mistakenly advised the defendant in its response to defendant's motion for a bill of particulars and discovery that "[t]here was no electronic eavesdropping by the Government of the defendant Reed" (App. A-16).* On the morning of Monday, February 10, 1975—the day the *Miranda* hearing was held but three days before the commencement of trial—the Government corrected the mistake and advised counsel that there was, after all, a tape containing two recorded conversations lasting a total of under five minutes, between the defendant and Special Agent Simpson on February 19, 1974, and handed counsel a four-page typewritten transcript. Three days later on February 13, the first day of trial, the court admitted into evidence the tape, which was played for the jury by the Government. The jury was provided with the four-page transcript as an aid in listening to the tape (App. A-18-21). Defendant contends that the court's refusal to preclude the use of the taped conversations was reversible error.

Rule 7(f) of the Federal Rules of Criminal Procedure provides in part:

> "A bill of particulars may be amended at any time subject to such conditions as justice requires."

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* Reed makes no claim here that the misrepresentation was the product of anything other than inadvertent oversight.

The law has long been that the determination of whether and under what conditions amendment to the bill of particulars is permissible is a matter solely for the discretion of the trial judge, which will not be disturbed absent a showing that he abused his discretion. *See, e.g., United States* v. *Pellegrino*, 273 F.2d 570, 571 (2d Cir. 1960); *Isaacs* v. *United States*, 159 U.S. 487, 489 (1895). In order to establish an abuse of discretion, the defendant must clearly show that the allowed amendment to the bill of particulars taken together with the conditions imposed by the court failed to protect the defendant from actual and substantial prejudice or unfair surprise at trial, or otherwise prevented the defendant from adequately preparing for trial. *United States* v. *Glaze*, 313 F.2d 757, 759-60 (2d Cir. 1963); *United States* v. *Murray*, 297 F.2d 812, 819 (2d Cir.), *cert. denied*, 369 U.S. 828 (1962); *United States* v. *Silverman*, 449 F.2d 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *United States* v. *Birrell*, 447 F.2d 1168, 1171 (2d Cir. 1971), *cert. denied*, 404 U.S. 1025 (1972); *United States* v. *Burgos*, 269 F.2d 763, 767 (2d Cir. 1959), *cert. denied*, 362 U.S. 942 (1960); *United States* v. *Perez*, 489 F.2d 93, 95 (5th Cir. 1974); *United States* v. *Theriault*, 474 F.2d 359, 361 (5th Cir.), *cert. denied*, 411 U.S. 984 (1973); *O'Malley* v. *United States*, 378 F.2d 401, 405 (1st Cir.), *cert. denied*, 389 U.S. 1008 (1967). Even where the trial court refused to grant any continuance after having permitted an amendment on the very eve of trial, there was no abuse of discretion absent a clear and specific showing of prejudice to the defendant. *United States* v. *Edelman*, 414 F.2d 539, 542 (2d Cir. 1969), *cert. denied*, 396 U.S. 1053 (1970).

Moreover, while we answer on its own terms Reed's argument that the Government's conduct amounted to an amendment to its bill of particulars, Reed's real claim is not that the particulars of the charges against him were amended, but rather that the government failed to produce at

the appropriate time before trial his recorded oral "statements" within the meaning of Rule 16(a), Fed.R. Crim.P.

A trial court's exercise of discretion in determining a claim of untimely compliance with Rule 16(a), as with a claim of improper amendment of a bill of particulars, will not be disturbed in the absence of some showing of real prejudice to the defendant. *See, United States* v. *Cirillo*, 499 F.2d 872, 881-83 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974). *United States* v. *Pomares*, 499 F.2d 1220, 1223 (2d Cir.), *cert. denied*, 419 U.S. 1032 (1974).

In the instant case, Reed has made not even a minimal showing of prejudice or harm to his defense as a result of Judge Palmieri's ruling, particularly since the court also ruled that trial would not commence until three days after counsel was informed of the very brief tape and given the transcript. The cases, including those relied upon by Reed, require that the defendant not be deprived of an adequate opportunity to meet the charge against him and that he not be surprised at trial. *United States* v. *Neff*, 212 F.2d 297, 309-10 (3d Cir. 1954). Judge Palmieri's ruling here was succesfully aimed at the protection of precisely those interests.

POINT II

It was not error for the court, having offered to inquire of prospective jurors whether they were prejudiced against blacks, to refuse to ask the specific questions submitted by the defendant.

Defendant requested that the court ask prospective jurors the following two questions during the *voir dire*:

> "5. Have any one of you in the course of your lives had any unpleasant experience with either an individual of [sic] a group of persons different from your own racial group—With Blacks?

> "6. Have any of you ever belonged to any organization, labor union, tenants group or body of any kind which was involved in a racial dispute? If so what was the nature of the dispute? When did it take place?" (App. A-26)

On appeal, defendant says in his statement of facts:

> "The court arbitrarily refused to ask any questions of the prospective panel on the issue of race prejudice and defense counsel excepted." (Br. 8)

Either counsel has failed to read the record below, or deliberately seeks to mislead this Court. The following colloquy occurred in connection with defendant's requests:

> "Ms. Piel: Then I would want to except to your failure to give my instructions, which is a Court exhibit, anything in the nature of questions 5 and 6?
>
> "The Court: I decline to give them and you may have an exception.
>
> "Ms. Piel: Of course, what it has to do with, your Honor should be aware, it has to do with the issue of race.
>
> "The Court: If you wish, I will ask whether anybody on the jury has any prejudice because of the defendant's membership in the negro race. Do you want me to ask that?
>
> "Ms. Piel: I don't think that is an appropriate question.
>
> "The Court: Do you want me to ask the questions just as you phrase them?
>
> "Ms. Piel: I refer you to United States v. Aldrich.
>
> "The Court: I don't know what you are talking about. United States v. Aldrich at this moment does not mean anything to me. If you tell me that I got [sic] to ask questions 5 and 6 the way you phrase

them, I decline to do so. The only question I will ask is whether they have any prejudice against negroes, and that you say you don't want me to ask.

"Ms. Piel: It is not an adequate question.

"The Court: Then I decline to give the question as you phrase them.

"Ms. Piel: I have no pride of authorship. However, the issue should be raised.

"The Court: I'm not here to paraphrase your questions. All I can do is to pass on the questions as you submit them, and I decline." (Tr. 18-19)

Having refused the court's offer to inquire of the prospective jurors whether defendant being black might prejudice them, Reed now claims that Judge Palmieri's refusal to ask the specific questions submitted by him was reversible error. The argument borders on the frivolous.

In the Federal court system, the judge conducts the examination of prospective jurors, permitting such supplementation by counsel as he deems proper, and the judge's rulings as to the questions to be put may be reversed only on a showing that the court violated "the essential demands of fairness." *Aldridge* v. *United States*, 283 U.S. 308 (1931). In *Aldridge* a black defendant was on trial for the murder of a white man. The trial court summarily refused counsel's request for any kind of inquiry on the issue of racial prejudice and whether the fact that the defendant was black and the murder victim white might influence the jurors' judgment. The Supreme Court held that this was error and ruled that the trial court must, upon timely request by the defendant, inquire whether prospective jurors have "any racial prejudice . . . which would prevent their giving a fair and impartial verdict." *Id.* at 311.

This ruling was raised to a constitutional requirement in *Ham* v. *South Carolina*, 409 U.S. 524 (1973). There, defen-

dant had unsuccessfully requested the trial court to ask the following questions:

> "1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?
>
> "2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?" *Id.* at 525 n.2.

Writing for a unanimous Court on this point, Mr. Justice Rehnquist stated:

> "We agree with the dissenting justices of the Supreme Court of South Carolina that the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner. The Court in *Aldridge* was at pains to point out, in a context where its authority within the federal system of courts allows a good deal closer supervision than does the Fourth Amendment, that the trial court 'had a broad discretion as to the questions to be asked,' 283 U.S., at 310. The discretion as to form and number of questions permitted by the Due Process Clause of the Fourteenth Amendment is at least as broad. In this context, either of the brief, general questions urged by the petitioner would appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain." *Id.* at 527.

At least after *Ham*, the law is unmistakable in both its aspects: (1) the trial court must, upon timely request, inquire into possible racial prejudice by prospective jurors; but on the other hand, (2) the judge is still in charge of the *voir dire* and the essential demands of fairness do not

mandate that he inquire in the specific way submitted by the defendant. This Court has stated its agreement.* In *United States* v. *Grant*, 494 F.2d 120, 122-23 (2d Cir.), *cert. denied*, 419 U.S. 849 (1974), this Court said ". . . trial judges in the future should inquire into the subject of racial prejudice, if reasonably requested to do so by defense counsel," then went on to state that:

> ". . . possible racial prejudice of prospective jurors can be effectively explored without undermining the trial judge's salutary control of the scope of voir dire. Exercising his broad discretion under Fed. R. Crim. P. 24(a), the trial judge need not ask every question on this subject which the ingenuity of counsel can devise. It should suffice to ask a brief question or two, such as the one requested in this case [whether the fact that defendant was black would prevent any juror from rendering a fair and impartial verdict], or even a more general query whether any juror is unable to judge the case fairly because of the race, creed or color of the defendant."

Lest there be any misunderstanding, the Court proceeded to reiterate in the next paragraph of the opinion that it intended in no way to undermine the broad discretion of trial judges to inquire into possible bias or prejudice, ". . . since this is an area where it has long been the view of our court that 'the entire voir dire procedure in the empaneling of a jury, by its nature, is one best left to the sound discretion of the judge.'" *Id.* at 123.

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* So have other Federal Circuit courts. *See, e.g., Ross* v. *Ristaino*, 508 F.2d 754, 757 (1st Cir. 1974); *United States* v. *Bamberger*, 456 F.2d 1119, 1129 (3d Cir.), *cert. denied as Crapps* v. *United States*, 406 U.S. 969 (1972), *and* 413 U.S. 919 (1973); *United States* v. *Gore*, 435 F.2d 1110, 1111-1113 (4th Cir. 1970); *United States* v. *Thompson*, 490 F.2d 1218, 1222 (8th Cir. 1974).

Judge Palmieri in the present case offered to make the inquiry into racial prejudice which the Supreme Court and this Court have mandated, but defense counsel declined the offer. That being the case, the court was not obligated to adopt the specific questions propounded by defendant. Moreover, here, unlike *Ham* and *Aldridge*, there were no aggravating facts and circumstances suggesting the possibility of a verdict tainted by racial prejudice.*

POINT III

The defendant's rights were not violated by the admission into evidence of his pre-arraignment statement to the Assistant United States Attorney.

Prior to trial, Judge Palmieri conducted an evidentiary hearing in connection with Reed's motion to suppress certain of his post-arrest statements assertedly obtained in derogation of his *Miranda* rights. At that hearing Assistant United States Attorney Alan Kaufman testified that on November 19, 1974, he interviewed the defendant after his arrest and prior to his arraignment before a United States

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* The trial court repeatedly stressed to the jurors that they must make their findings without any form of prejudice against the defendant. At the very outset of the two-day trial, Judge Palmieri underlined the importance of the case proceeding "without prejudice, without outside interference or taint of any kind" (Tr. 36). At the beginning of his charge to the jury he twice reminded them to give a "fair, impartial and careful consideration of all the evidence," (Tr. 149) and admonished them at the end of his charge, just before they retired to deliberate, to "come to your conclusion without fear, favor or prejudice of any kind" (Tr. 178). Finally, although most of the questioning of prospective jurors was not recorded by the court reporter, it appears that the court was equally emphatic during the *voir dire* on the importance of deciding the case without the slightest bias or prejudice of any kind (Tr. 13-14).

Magistrate. Kaufman identified himself, advised the defendant that he was charged with violating the Federal narcotics laws, and told him that he was about to be taken before a Magistrate for the fixing of bail (H. Tr. 13). Then Kaufman advised the defendant of his rights:

> "I told Mr. Reed that he had the absolute right to remain silent. I asked him if he understood that, and he said he did.
>
> "I told him that anything that he said could be used against him. I asked him if he understood that, and he said he did.
>
> "I told him that he had the right to an attorney and to have that attorney present during the interview. I asked him if he understood that, and he said he did.
>
> "And I told him that if he could not afford an attorney, an attorney would be appointed for him, and that he did not have to say anything until that attorney was appointed and he could consult with him. I asked him if he understood that, and he said he did.
>
> "At that point I asked Mr. Reed, as I do every defendant whom I am interviewing, whether or not he could afford his own attorney or whether he needed counsel appointed for him. And he said he needed appointed counsel.
>
> "At that time I asked him whether or not he wanted to answer any questions, first questions concerning his own personal background, and then questions surrounding the circumstances of the particular case. He said he did." (H.Tr. 14).

Kaufman further testified that Reed never requested the appointment of counsel for the purpose of the interview and that Reed never stated he wished to speak to a lawyer before answering any questions (H.Tr. 16, 32-35). Kaufman

explained that his handwritten notation, "Needs appointed lawyer," on Reed's interview sheet (GX 3502; App. A-22-25) indicated only that Reed had advised him, in response to a question by Kaufman, that he, Reed, would later need appointed counsel because of a lack of funds. Kaufman's testimony was corroborated by Agent Kobell of the DEA. Kobell, who was present during the interview, testified that Reed said on that occasion that he would need counsel appointed for him, but that he did not wish to have counsel present during the interview (H.Tr. 45).*

In contrast, Reed testified that during the interview he had stated he "needed a legal aid lawyer," but had been told by an agent that he did not need one for the interview because he was cooperating and was going to be released on his own recognizance (H.Tr. 51).

Judge Palmieri resolved the conflict in the evidence by crediting the testimony of Kaufman and Kobell and rejecting that of Reed. Judge Palmieri further found that Kaufman's notation, "Needs appointed lawyer," was intended to denote that Reed needed a lawyer prospectively, but that he did not want a lawyer at the time of the interview (H.Tr. 60-62). Given these findings, which were amply supported by the record, Judge Palmieri's denial of the motion to suppress was entirely correct.

The law in this Circuit, as repeatedly enunciated by this Court, is that where a defendant is clearly and properly advised of his rights under *Miranda*, indicates that he understands those rights, and then proceeds to make incriminating statements, his Fifth and Sixth Amendment rights have not

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* Apparently by the time of the pre-arraignment interview, Reed had expressed a desire to cooperate with the government (H. Tr. 29-30, 32; GX 3502).

been violated and the statements should not be suppressed. It is not necessary to have the defendant state that he explicitly waives his rights, nor is it necesary that he be explicitly asked whether he waives them. *United States* v. *Diggs*, 497 F.2d 391, 392-93 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974); *United States* v. *Masullo*, 489 F.2d 217, 221-22 (2d Cir. 1973); *United States* v. *Cassino*, 467 F.2d 610, 620 n. 30 (2d Cir. 1972), *cert. denied as Curico* v. *United States*, 410 U.S. 913 (1973), *and* 410 U.S. 928 (1973); *United States* v. *Lamia*, 429 F.2d 373, 377 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970); *United States* v. *Vanterpool*, 394 F.2d 697, 699 (2d Cir. 1968). *See, United States* v. *Vigo*, 487 F.2d 295, 298-99 (2d Cir. 1973); *United States* v. *Ramirez*, 482 F.2d 807, 815-816 (2d Cir.), *cert. denied as Gomez* v. *United States*, 414 U.S. 1070 (1973); *United States* v. *Carneglia*, 468 F.2d 1084, 1090-91 (2d Cir. 1972), *cert. denied as Inzerillo* v. *United States*, 410 U.S. 945 (1973). The law is the same in other Circuits. *See, e.g.*, *United States* v. *Speaks*, 453 F.2d 966, 968-69 (1st Cir.), *cert. denied*, 405 U.S. 1071 (1972); *United States* v. *Brown*, 459 F.2d 319, 323-24 (5th Cir. 1971), *cert. denied*, 409 U.S. 864 (1972); *United States* v. *Vaughn*, 496 F.2d 622 (6th Cir. 1974); *United States* v. *Biondo*, 483 F.2d 635, 642-43 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974).

The language of this Court in *United States* v. *Masullo*, *supra* at 221, is particularly apt to this case:

> "A reading of the transcript of the hearing makes it clear beyond doubt that Masullo's admissions constituted a waiver of his right to remain silent. . . . There are no claims made of unnecessary, prolonged or harassing custodial interrogation."

There, as here, there was no waiver *in haec verba* of defendant's rights under *Miranda;* however, understanding his rights, the defendant proceeded voluntarily to speak. As the Court said in *United States* v. *Lamia*, *supra* at 377:

> "We find that [the defendant's] affirmative response to Agent Myers' question regarding his understanding

of his rights, as well as his subsequent actions, were a voluntary and knowing waiver of his rights."

It is undisputed here that Reed was advised clearly and fully of his *Miranda* rights, including the rights to remain silent and to have counsel present during the interview; that Reed understood those rights; and that he told the Assistant United States Attorney that he wanted to answer his questions, then proceeded to do so. On these facts, Judge Palmieri was clearly correct in permitting the introduction into evidence of Reed's admissions in response to those questions.

POINT IV

Defendant was not deprived of a fair trial by Judge Palmieri's occasional questions to witnesses, nor by the Government's reading in summation from a document from which defense counsel read in her opening statement.

The Government witnesses were four Special Agents of the DEA. On cross-examination of two of the agents, Simpson and Gordon, defense counsel inquired whether they told untruths to the persons with whom they dealt in an undercover capacity, and both admitted that they did (Tr. 59-62, 72-74). After almost three pages of cross-examination of Agent Simpson as to the various falsehoods that he had told Reed and the other persons involved in the negotiation of this cocaine purchase (Tr. 59-61), the court intervened and asked the following questions:

"You did everything you could to lead these persons to believe the money was yours?

"The Witness: Yes.

"The Court: You didn't tell them it was Government money?

"The Witness: No, sir.

"The Court: You also didn't give your own identity?

"The Witness: No.

"The Court: Or your connection with the Government?

"The Witness: No.

"The Court: And you led them to believe this was your money that you were using because you wanted to purchase the cocaine for yourself?

"The Witness: Yes sir.

"The Court: You said whatever was necessary to reinforce that impression?

"The Witness: Yes, sir." (Tr. 61-62).

After defense counsel questioned Agent Gordon for two pages about his misrepresentations while doing undercover work, Gordon testified on redirect that he always tells the truth in court, "but in the field working, no, I don't" (Tr. 74). On recross-examination by defense counsel, the following exchange occurred:

"Q. Let me ask you a little bit about the truth. Do you think it is all right to lie to people if you can arrest them?

"The Court: You are arguing with this witness, Ms. Piel. What he thinks or what he believes is of no concern to us and irrelevant to the case. You can ask him what he did and then you can argue to the jury with respect to that. But I will not allow you to conduct a philosophical discussion with this witness. He has admitted in the course of his work he has had to use guile and misrepresentation. Now, I will not permit you to continue this line of questioning in terms of the truth, of what he believes to be the truth." (Tr. 74).

A few moments later, the court continued:

> "You can ask him what his method of operation is, and I think you have already brought out that he does not reveal his identity, that he uses a guile and strategm [*sic*] and misrepresentation. The witness has testified that he tells the truth when sworn as a witness in court; he does not make truthful representations when he is dealing outside in the course of his undercover work. Now, you can take that as a basis for any argument you wish when you sum up to the jury.
>
> "Ms. Piel: Thank you so much. I have no further questions." (Tr. 75).

Defendant's position is that these exchanges foreclosed cross-examination, usurped the function of counsel, and converted the trial judge into an advocate for the Government (Br. 30), thus depriving him of a fair trial.*

The test by which to measure the propriety of the trial judge's conduct in the jury's presence was stated in *United States* v. *Nazzaro*, 472 F.2d 302, 303 (2d Cir. 1973):

> ". . . [A] judge's participation during trial—whether it takes the form of interrogating witnesses, addressing counsel, or some other conduct—must never reach the point at which it appears clear to the jury that the court believes the accused is guilty."

See also, United States v. *Guglielmini*, 384 F.2d 602, 604-05 (2d Cir. 1967). Nothing which Judge Palmieri did in this trial approached that point. It is obvious from a mere reading of the record that in each instance of which defendant complains, Judge Palmieri intervened only after defense counsel had amply made her point—that the undercover agents lied and used subterfuge in their work—and had begun asking the witness argumentative, irrelevant questions. That the court refused to permit the examination

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* Out of 213 questions asked by both sides during the trial, there were only 6 instances of the court's either asking questions or addressing counsel regarding the examination (Tr. 60, 61-62, 74-75, 77-78, 81, 96).

to go so far is hardly error; nor did it render the judge anything other than "impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested." *United States* v. *Brandt*, 196 F.2d 653, 655-56 (2d Cir. 1952).*

Indeed, the court was merely fulfilling its traditional responsibilities, as recently codified in Rule 611(a) of the new Federal **Rules of Evidence**:

> "(a) Control by court.—The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

The cases are legion supporting the conclusion that Judge Palmieri's conduct here was perfectly proper. *See, e.g., United States* v. *Hendrix*, 505 F.2d 1233, 1237 (2d Cir. 1974); *United States* v. *Weiss*, 491 F.2d 460, 467-69 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974); *United States* v. *Kaylor*, 491 F.2d 1127, 1130 (2d Cir. 1973) *vacated on other grounds*, 418 U.S. 909 (1974); *United States* v. *Sclafani*, 487 F.2d 245, 256 (2d Cir.), *cert denied*, 414 U.S. 1023 (1973); *United States* v. *Newman*, 481 F.2d 222, 223-24 (2d Cir.), *cert. denied*, 414 U.S. 1007 (1973); *United States* v. *Fernandez*, 480 F.2d 726, 735-38 (2d Cir. 1973); *United States* v. *Boatner*, 478 F.2d 737, 738-42 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973); *United States* v. *McCarthy*, 473 F.2d 300, 307-08 (2d Cir. 1972); *United States*

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* Judge Palmieri's limited questioning provided no basis for the jury to infer that the trial judge had a personal belief in the guilt or innocence of the defendant. Indeed in his charge Judge Palmieri said in pertinent part:

> "I am not, in any way, however, attempting to underwrite the credibility of any witness in this case. As I told you at the outset, ladies and gentlemen, these agents appear as witnesses; their credibility is for you to decide, not for me to decide" (Tr. 168).

v. *DeSisto*, 289 F.2d 833, 834-35 (2d Cir. 1961). *See also, United States* v. *Gonzalez*, 483 F.2d 223, 225-26 (2d Cir. 1973); *United States* v. *Colabella*, 448 F.2d 1299, 1301-03 (2d Cir. 1971), *cert. denied*, 405 U.S. 929 (1972).

Defendant's other assigned ground for denial of a fair trial—the Government's reading from the Assistant United States Attorney's interview form—is equally without basis. During summation the Assistant United States Attorney, in summarizing defendant's confession before Mr. Kaufman at the time of his arrest, read from Kaufman's notes recorded on the interview form (Tr. 135-36). Defendant's objection was properly overruled on two grounds: (1) defense counsel had read from the same document during her opening statement (Tr. 43-44, 81); and (2) the interview form, while not in evidence, consisted only of Kaufman's notes and contained nothing which had not been testified to by Agent Kobell (*Compare* Tr. 80-82, 85-87 *with* App. A-22-25). Thus, even if it otherwise would have been error to permit the reading from the interview sheet, it resulted in absolutely no prejudice to defendant in this case.

POINT V

The trial court did not abuse its discretion by refusing to exclude, for purposes of impeachment, Reed's conviction for criminal possession of stolen property, which was less than five years old at the time of trial.

On June 16, 1970, in New York Supreme Court for Bronx County, Reed pleaded guilty to criminal possession of stolen property in the second degree, a felony under the New York Penal Law. Prior to trial in the present case, he moved for an order to preclude the Government from using the conviction to impeach his testimony in the event that he testified in his own defense. Judge Palmieri denied the application,

and Reed claims that the denial was an abuse of discretion. The claim is frivolous.

The general rule is that any witness, including the defendant, may be cross examined as to prior convictions of a felony. *See, e.g., United States* v. *De Angelis,* 490 F.2d 1004, 1009 (2d Cir.), *cert. denied,* 416 U.S. 956 (1974); *United States* v. *Christophe,* 470 F.2d 865, 870 (2d Cir. 1972), *cert. denied as Panica* v. *United States,* 411 U.S. 964 (1973); *United States* v. *Puco,* 453 F.2d 539, 541-44 (2d Cir. 1971), *cert. denied,* 414 U.S. 844 (1973); *United States* v. *Palumbo,* 401 F.2d 270, 273 (2d Cir. 1968), *cert. denied,* 394 U.S. 947 (1969).

It is also the law that, at least where the witness is the defendant, the trial court has discretion to exclude the use of a prior conviction for cross-examination. *United States* v. *Puco, supra; United States* v. *Palumbo, supra.* In *Palumbo,* this Court approved the use of five prior felony convictions for cross-examination, and set forth four representative factors to be weighed by the trial court in making similar determinations: (1) the nature of the conviction, (2) its bearing on veracity, (3) its age, and (4) its propensity to influence improperly the minds of the jurors. 401 F.2d at 273. In *Puco,* this Court applied *Palumbo* to reverse a conviction on the basis that a 21 year old narcotics conviction should not have been used to impeach the defendant, who was on trial for another narcotics offense. The Court found that the ancient conviction "negate[d] credibility only slightly but create[d] a substantial chance of unfair prejudice . . ." 453 F.2d at 543, quoting *Palumbo,* 401 F.2d at 273.

Following *Puco's* emphasis on the age of the conviction, this Court in *United States* v. *De Angelis, supra,* upheld the use of a seven year old conviction, finding it "neither remote in time from the present offense nor unrelated to

[the defendant's] veracity." 490 F.2d at 1009. In an observation equally relevant to the present case, the Court noted:

> "While some prejudicial effect is bound to result from any testimony regarding a witness' prior conviction, that effect here did not so outweigh the probative value of the testimony as to require its exclusion." *Id.*

Similarly, in *United States* v. *Christophe, supra,* this Court permitted the use of a 12-year old conviction, even though it was for the same offense as the one for which the defendant was on trial:

> "The use of a 12 year old conviction, where the defendant was not released from prison until 8 years prior to trial, comes well within the limits of the trial judge's discretion to bar or permit such evidence." 470 F.2d at 870.

Under these cases, the trial court here was amply within its discretion in refusing to exclude the defendant's conviction, less than five years before trial, for a crime involving dishonesty. The court was also well within Rule 609 of the Federal Rules of Evidence, effective July 1, 1975, which permits the use of impeachment of any conviction of a crime within 10 years before trial, and, where the crime involves dishonesty, without the necessity of a determination by the court that the probative value outweighs the prejudicial effect to the defendant. Fed.R.Ev. 609(a)(2), (b).

Judge Palmieri's decision was not only not an abuse of his discretion but was clearly a proper and correct exercise of it.

POINT VI

The trial court did not err in refusing to instruct the jury on the issue of entrapment.

As recited in more detail in the Statement of Facts herein, the undercover DEA agents negotiated the sale of the quarter kilogram of cocaine both with Lucien Feldon and with Gerald Hardy before even meeting Reed. However, once having met the defendant, who was described by Hardy as "my man" and his "source" (Tr. 48), Reed essentially ran the operation. It was he who switched the deal to "flake" cocaine when he thought his people would not go along with Simpson's seeing the cocaine before paying for it (Tr. 50); it was he who promised Simpson in the recorded telephone conversation that he would find out about pricing arrangements for the deal (GX 1, 1-A; App. A-18); and it was he who, by his own admission, arranged for the purchase of the drugs from "Red" at the carpet store (Tr. 81). Nonetheless, citing testimony by the undercover agents that they were indeed desirous of having the defendant go through with the deal and provide the cocaine (Tr. 58, 61), Reed argues that he was entitled to an instruction on entrapment (App. A-29-30).

In order for a charge of entrapment to be given there must be some evidence that the Government implanted the criminal design in the mind of the defendant. *United States v. Russell*, 411 U.S. 423, 435-36 (1973). In this Circuit, the test is bifurcated:

> "(1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it."

United States v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (L. Hand, *J.*). While the defendant's burden of showing inducement is "relatively slight," *United States* v. *Henry*, 417 F.2d 267, 269 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970), he must show more than merely that the Government agents afforded an opportunity for his commission of the crime. *United States* v. *Russell*, *supra* at 435; *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 411-43 (1932). The evidence must raise a genuine issue of fact. *Lopez* v. *United States*, 373 U.S. 427, 434-35 (1963); *United States* v. *Henry*, *supra at* 269-70. Moreover, he cannot establish inducement from the fact that his involvement may have arisen from the actions of a co-conspirator, even though that co-conspirator may have been responding to the inducement of a Government agent or informant. *United States* v. *Sanchez*, 440 F.2d 649, 650 (9th Cir. 1971). *Cf. United States* v. *Conversano*, 412 F.2d 1143, 1148 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969). Here, assuming any inducement by the Government occurred, it was directed only to Feldon and possibly Hardy, but certainly not Reed. Insofar as Reed was concerned, the agents merely held themselves out to him as willing purchasers prepared to buy first what Feldon and Hardy had already arranged with Reed to sell, and then the "flake" cocaine which Reed on his own had arranged to sell. The record is utterly devoid of any evidence of inducement. *United States* v. *McMillan*, 368 F.2d 810, 812 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); *United States* v. *Christopher*, 488 F.2d 849, 850-51 (9th Cir. 1973); *Kibby* v. *United States*, 372 F.2d 598, 602 (8th Cir.), *cert. denied*, 387 U.S. 931 (1967).*

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* The showing of inducement here would likewise fail under the First Circuit's single-issue approach, which is arguably easier for the defendant than the bifurcated standard of this Circuit. *United States* v. *Miley*, 513 F.2d 1191, 1202-03 n. 8 (2d Cir. 1975). In *Kadis* v. *United States*, 373 F.2d 370, 374 (1st Cir. 1967), that Court held that defendant's showing of entrapment "is not made simply by evidence of a solicitation. There must be some evidence tending to show unreadiness." There was not the slightest showing of unreadiness in the present case.

Finally, regardless of any question of inducement, the Government proved that when Reed met with the agents for the first time he was fully prepared to go forward with the sale, that on his own initiative he switched the deal to one involving "flake" cocaine from another source, discussed the price of the cocaine under the new arrangement, and met with "Red" at the carpet store in connection with the sale. Since the Government thus established Reed's propensity by substantial and uncontradicted evidence, it was, for this additional reason, unnecessary for the trial court to submit the issue of entrapment to the jury. *United States* v. *Miley*, 513 F.2d 1191, 1202 (2d Cir. 1975); *United States* v. *Nieves*, 451 F.2d 836, 838 (2d Cir. 1971); *United States* v. *Greenberg*, 444 F.2d 369, 372 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971).

In sum, there was nothing to support defendant's request for an entrapment charge except the "semantic contentions of counsel," *United States* v. *Miley*, *supra* at 1202, and that is clearly inadequate.*

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* Defendant's requested instructions on withdrawal from the conspiracy and the "single-act" doctrine (App. A-34), were even less justified by the evidence. The record is devoid of even the suggestion that Reed took "affirmative action" to "disavow or defeat the purpose" of the conspiracy, *Hyde* v. *United States*, 225 U.S. 347, 369 (1912), either by informing the authorities of the existence of the conspiracy or by communicating the "abandonment [of the conspiracy] in a manner reasonably calculated to reach co-conspirators." *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied as Mogavero* v. *United States*, 379 U.S. 960 (1965). *See also*, *United States* v. *Cantone*, 426 F.2d 902, 905 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970); *United States* v. *Gonzalez—Carta*, 419 F.2d 548, 551 (2d Cir. 1969); *United States* v. *Schwenoha*, 383 F.2d 395, 396-97 (2d Cir. 1967), *cert. denied*, 390 U.S. 904 (1968). *Compare United States* v. *Schwenoha*, *supra*, *with United States* v. *Agueci*, 310 F.2d 817, 838-39 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

[Footnote continued on following page]

POINT VII

The defendant was not prejudiced by the trial court's erroneous recollection, conveyed to the jury but immediately corrected, that defendant had mentioned $7,000 in his pre-arraignment confession.

Following his arrest and prior to arraignment, Reed confessed, in the presence of the Assistant United States Attorney and two DEA agents, that he had in fact negotiated to sell a quarter kilogram of cocaine to a black man. However, he did not mention that it was to be sold for $7,000, or for any other figure. During his charge to the jury, Judge Palmieri, in summarizing the confession testified to by Agent Kobell, erroneously stated that Reed had mentioned the $7,000 figure (Tr. 165, 175). The mistake was brought to the court's attention (Tr. 182-84) and Judge Palmieri apologized to counsel and immediately advised the jury:

> "Ladies and gentlemen, I made a mistake in recalling the testimony of Kobell and I want to correct it. I don't want to repeat what I said, but I did inject into that testimony the figure of $7,000. Kobell didn't use any figure of any amount of money when he testified, and so my using that amount of money

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Even aside from the fact that Reed, who took a number of steps toward negotiating, procuring and delivering the cocaine, performed a great deal more than a "single act," that doctrine is strictly a formulation for the trial court to use in passing on the sufficiency of the Government's proof as a whole. The "single act" cases do not imply that the jury should be instructed as to the doctrine, or that the court should suggest to the jury its application to the particular case. *United States* v. *Torres*, 503 F.2d 1121, 1123-24 (2d Cir. 1974); *United States* v. *Ramirez*, 482 F.2d 807, 816 (2d Cir.), *cert. denied as Gomez* v. *United States*, 414 U.S. 1070 (1973); *United States* v. *DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971); *United States* v. *Reina*, 242 F.2d 302, 306-07 (2d Cir.), (L. Hand. *J.*), *cert. denied, as Moccio* v. *United States*, 354 U.S. 913 (1957).

> when I referred to his testimony was incorrect, and I want you to disregard what I said to that extent." (Tr. 184).

Reed contends that despite this correction, Judge Palmieri undercut his summation and assured his conviction. The contention is frivolous on its face.

Despite defendant's suggestion, this is hardly an instance where the case went to the jury after the court had added to or exaggerated the evidence. *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974). On the contrary, Judge Palmieri's mistake, involving a mere detail of the defendant's confession, was immediately corrected for the jury. *See United States* v. *La Vecchia,* 513 F.2d 1210, 1214-15 (2d Cir. 1975).

Moreover, the court could not have been clearer in instructing the jurors that they alone were the triers of fact and that it was exclusively their recollection of the facts which controlled their deliberations (Tr. 146-48).

Under the circumstances, it is impossible to conceive of how the defendant was prejudiced by the court's remarks taken as a whole. *See United States* v. *Birnbaum,* 373 F.2d 250, 257-63 (2d Cir.), *cert. denied,* 389 U.S. 837 (1967). *Cf.*, 1 Weinstein's Evidence ¶ 107 [03], p. 107-42, 43, 46 (1975).

POINT VIII

The trial court committed no prejudicial errors in this case.

As specifically discussed in Points I through VII above, the defendant was in no way prejudiced by the conduct of the trial court; much less was there any error affecting the substantial rights of the accused. Fed. R. Crim. P. 52(a). As this court said in *United States* v. *Birnbaum,* 373 F.2d 250, 257 (2d Cir.), *cert. denied,* 389 U.S. 837 (1967):

> "The relevant inquiry for an appellate court therefore, is not whether the trial was free from errors, but rather whether it was free from *prejudicial* errors." (emphasis in original).

The Court's evaluation of defendant's claims in that case applies directly to Reed's contentions here:

> "In summary, upon reviewing the entire charge and considering each of appellant's arguments, we are of the view that if errors were committed, they were but separate, unintentional, isolated and non-prejudicial instances, and that none of Birnbaum's contentions, either individually or collectively, demonstrate that he was deprived of a fair trial." *Id.* at 263.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1975— 614—215—531

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) ss.:
COUNTY OF NEW YORK)

Richard J. Hoskins being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 2d day of July, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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Richard J. Hoskins

Sworn to before me this

2d day of July 1975

Peter C. Salerno

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